

# PROVIDER REIMBURSEMENT REVIEW BOARD HEARING DECISION

2005-D1

## PROVIDERS –

Guaynabo Home Care, Inc.  
Font Martello Home Care, Inc.  
Fajardo Home Care, Inc.  
El Gigante Home Care, Inc.

Provider No. 40-7013, 40-7017  
40-7019, 40-7024

vs.

**INTERMEDIARY** – Blue Cross Blue  
Shield Association/United Government  
Services

## DATE OF HEARING –

January 28, 2004

Cost Reporting Periods Ended  
December 31, 1999

**CASE NOS.** 02-0212, 02-0214  
02-0213, 02-0215

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ISSUE:

Whether the Providers' receivable financing was a loan or sale of assets.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

This is a dispute over the amount of Medicare reimbursement to providers of medical services. The Medicare program was established to provide health insurance to the aged and disabled. 42 U.S.C. §§1395 – 1395cc. The Centers for Medicare and Medicaid Services (CMS) – formerly the Health Care Financing Administration (HCFA), is the operating component of the Department of Health and Human Services charged with administering the Medicare program. CMS' payment and audit functions under the Medicare program are contracted out to insurance companies known as fiscal intermediaries. Fiscal intermediaries determine payment amounts due the providers under the Medicare law and under interpretative guidelines published by CMS. Id.

At the close of its fiscal year, a provider must submit a cost report to the intermediary showing the costs it incurred during the fiscal year and the portion of the costs to be allocated to Medicare. 42 C.F.R. §413.20. The fiscal intermediary determines the total amount of Medicare reimbursement due and notifies the provider in a notice of program reimbursement (NPR). 42 C.F.R. §405.1803. A provider dissatisfied with the intermediary's final determination of total reimbursement may file an appeal with the Provider Reimbursement Review Board (Board) within 180 days of the NPR. 42 U.S.C. §1395oo(a); 42 C.F.R. §405.1803.

BACKGROUND OF THE DISPUTE:

During the cost reporting period in question, Guaynabo Home Care Inc., Font Martello Home care, Inc., Fajardo Home Care, Inc., and El Gigante Home Care, Inc. (Providers) entered into an agreement with MedCapital Funding I Corporation (MedCap), a factoring organization, to obtain financing through the transfer of its accounts receivables. The Providers also had an agreement with Medicare Financial Solutions, Inc. during this period to obtain medical claims production, processing, and collection services.

United Government Services (Intermediary) audited the Providers' cost reports and disallowed what was claimed as interest expense. The Intermediary's determination was based on the contention that the Providers had sold their receivables and, therefore, no interest expense could be recognized under the Medicare program. The amounts in controversy are as follows:

- 1) Guaynabo Home Care Inc. - \$277,697
- 2) Font Martello Home Care, Inc. - \$1,523
- 3) Fajardo Home Care, Inc. - \$ 25,256
- 4) El Gigante Home Care, Inc. - \$ 24,097

The Providers were represented by S. Gary Werley, Esquire and Roxanna Badillo-Rodriguez, Esquire. The Intermediary's representative was James Grimes, Esquire, of Blue Cross Blue Shield Association.

PARTIES' CONTENTIONS:

The Intermediary contends that the issue in this case is whether or not the Providers' transactions with MedCap constituted a loan or a sale. The Intermediary claims that the disallowance of interest expense and other expenses related to the sale of receivables was made in accordance with CMS Pub 15-1 §219. Under this Section, if the interest expense is related to the sale of receivables, the expense is not allowable.

During the hearing, the Intermediary's witness testified that CMS Pub 15-1 §219 did not clarify what constitutes a sale of receivables as opposed to a loan. However, the Intermediary contends that the Provider Reimbursement Manual states that in situations not covered by the manual's guidelines and policies, generally accepted accounting principles (GAAP) should be applied. The Financial Accounting Standards Board (FASB) issued FAS 125<sup>1</sup> to address account receivable financing transactions that occur after December 31, 1996.

FAS 125 provides that a transfer of financial assets in which the transferor surrenders control over those financial assets shall be accounted for as a sale to the extent that consideration other than beneficial interests in the transferred assets is received in exchange. The transferor is deemed to have surrendered control over transferred assets if the following conditions are met:

- a. The transferred assets have been isolated from the transferor – put presumptively beyond the reach of the transferor and its creditors, even in bankruptcy or other receivership.
- b. Each transferee obtains the right-free of conditions that constrain it from taking advantage of the right to pledge or exchange the transferred assets.
- c. The transferor does not maintain effective control over the transferred assets through (1) an agreement that both entitles and obligates the transferor to repurchase or redeem them before their maturity, or (2) an agreement that entitles the transferor to repurchase or redeem transferred assets that are not readily obtainable.

With respect to paragraph "a," the Intermediary states that the MedCap agreement gives MedCap the exclusive right to purchase the receivables and the Providers agree to sell, transfer, assign and convey all their right, title and interest in the receivables. The Intermediary contends that the requirements of paragraph "b" were met because the MedCap agreement does not prohibit MedCap from pledging or exchanging the transferred assets. Finally, the Intermediary did not find any provision in the MedCap agreement which both entitles and obligates the Providers to repurchase the receivables as described in paragraph "c." Therefore, the Intermediary concluded

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<sup>1</sup> See Intermediary's Exhibit I-7.

that the Providers had surrendered control of the transferred assets, and the transaction was considered a sale with recourse.

With respect to paragraph “a,” the Providers contend that control has not been transferred if the transferor has the option to repurchase the receivable. Pursuant to Paragraph 10.04<sup>2</sup> of the MedCap agreement, the Providers, upon giving 30 days notice had the right to repurchase all, but not less than all, of the receivables for the purchase price equal to the then outstanding principal amount of the proceeds. The Providers further contend that, pursuant to state and federal law, the receivables transferred to MedCap by the Providers have not been isolated so as to be beyond the reach of the Providers and its creditor in the event of bankruptcy. The Providers also claim that the MedCap agreements do not state that the assignment of receivables would be free and clear of the Providers’ right to repurchase the receivables. Therefore, the Providers assert that the requirement of paragraph “b” have not been met.

#### FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

The Board, after consideration of the Medicare law, Program instructions, parties’ contentions and evidence presented, finds and concludes as follows:

The Board finds that it must first be determined whether the costs applicable to the MedCap Financing result from the sale of the Providers’ receivables or from a loan based upon those receivables. If it is determined that these costs result from a sale, they are non-allowable expenses since the Providers have merely opted to receive payment prior to collection on the accounts. If, however, the fees paid to MedCap result from a loan and are considered to be interest expenses, then it must be determined whether those costs are necessary and proper in accordance with Medicare regulations.

A review of the MedCap agreements against the criteria of FAS 125 leads to the clear conclusion that the transaction meets the conditions of a sale of assets with recourse. By the terms of the MedCap agreements, the Providers surrendered control over the financial assets in consideration of payments made at the time of acquisition. While Section 10.04 of the MedCap agreement does permit the Providers, upon 30 days written notice, to repurchase all but not less than all of the receivables, the requirements of that section leave the providers with no real control over the receivables, as the record established that most, if not all, of the receivables are liquidated within 14 days of billing. The Intermediary witness testified that approximately 90 percent of the Providers’ business was Medicare related, and Medicare generally pays clean claims in 14 days. As a result, the Providers cannot effectively exercise an option to repurchase all but not less than all of the receivables when the Providers must give a full 30-day written notice.

The Board finds that the costs paid to MedCap result from the sale of the Providers’ accounts receivables rather than from a loan based upon those receivables.

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<sup>2</sup> See Intermediary’s position paper for Guaynabo Home Care, Inc. Case No. 02-0213, Exhibit I-4.

DECISION AND ORDER:

The Intermediary's adjustments disallowing the Providers' interest expense were proper and are affirmed.

BOARD MEMBERS PARTICIPATING:

Suzanne Cochran, Esquire (Recused)

Dr. Gary Blodgett

Martin W. Hoover, Jr., Esquire

Elaine Crews Powell, CPA

Anjali Mulchandani-West

FOR THE BOARD:

DATE: October 29, 2004

Suzanne Cochran, Esquire  
Chairman